ORIGINAL

No. 95-6556

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHNNY LYNN OLD CHIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the district court erred in permitting the government to prove the nature of petitioner's prior felony conviction in support of a charge under 18 U.S.C. 922(g).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported, but the judgment is noted at 56 F.3d 75 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1995. A petition for rehearing was denied on August 2, 1995. Pet. App. 12a. The petition for a writ of certiorari was filed on October 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Montana, petitioner was convicted of possession of

a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); using and carrying a firearm during a violent crime, in violation of 18 U.S.C. 924(c); and assault with a dangerous weapon, in violation of 18 U.S.C. 1153 and 113(c). He was sentenced to 180 months' imprisonment and three years' supervised release. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-11a.

1. On October 23, 1994, on the Blackfoot Indian Reservation, petitioner and two friends drove to a liquor store to purchase beer. Petitioner had been drinking for most of the day. Anthony Calf Looking and a friend were at the store. Calf Looking, who had also been drinking, started a fight with petitioner and knocked him to the ground. Petitioner produced a 9mm semi-automatic pistol and fired at Calf Looking, who fled the scene. Petitioner and his friends got back in their truck and left the store. Gov't C.A. Br. 2-3.

Several moments later, petitioner stopped at a gas station where he met two other men. Petitioner fired at least one shot in the parking lot. Police officers arrived on the scene and arrested petitioner. The police found the pistol used by petitioner in the truck, and subsequently seized several rounds of 9mm ammunition and a spent 9mm casing from petitioner's pocket. Tr. 190; Gov't C.A. Br. 3-4.

2. Before trial, petitioner offered to stipulate to his status as a convicted felon, arguing that the introduction of his prior felony assault conviction to prove that element of the

unlawful possession charge[1] would be unduly prejudicial under Rule 403 of the Federal Rules of Evidence.[2] The prosecutor refused to stipulate to that element, and the district court denied petitioner's motion in limine. Pet. App. 2a.

3. The court of appeals affirmed petitioner's conviction, but vacated his sentence. Relying on circuit precedent, United States v. Breitkreutz, 8 F.3d 688 (1993), the court of appeals ruled that the government is entitled to prove a defendant's prior felony conviction through the presentation of probative evidence, notwithstanding the defendant's offer to stipulate to his status as a felon. Pet. App. 3a.[3]

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[1] 18 U.S.C. 922(g)(1) makes it a crime for any person:

> who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce, any firearm or ammunition.

[2] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[3] The court of appeals also rejected petitioner's claim that the evidence was insufficient to support his conviction for assault, and held that petitioner's conviction did not violate Brady v. Maryland, 373 U.S. 83 (1963). Pet. App. 3a-6a. The court also upheld the district court's refusal to conduct a post-verdict evidentiary hearing. Id. at 6a-7a. Because it concluded that the district court had made inadequate findings to support its departure upward from the maximum Guidelines sentence, the court of appeals vacated petitioner's sentence and remanded the case for resentencing. Id. at 7a-10a. Petitioner received the same sentence on remand. Pet. 3.

ARGUMENT

Petitioner contends (Pet. 9-16) that the district court erred in permitting the government to introduce evidence of the nature of his predicate felony under 18 U.S.C. 922(g) when he was willing to stipulate that he was a convicted felon. The court of appeals correctly rejected that claim. And while there is disagreement among the courts of appeals regarding whether the government may refuse to stipulate to the existence of a predicate felony in prosecutions under Section 922(g), this case would not be an appropriate vehicle for this Court's review because any error in the introduction of prior-felony evidence was harmless.

1. In United States v. Breitkreutz, supra, the Ninth Circuit held that a district court may admit evidence of the defendant's underlying conviction despite the defendant's willingness to stipulate to his felon status. The court observed that under this Court's decision in Estelle v. McGuire, 502 U.S. 62 (1991), "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Breitkreutz, 8 F.3d at 690 (quoting Estelle v. McGuire, 502 U.S. at 70). Accordingly, the government is not precluded from introducing evidence to prove the prior conviction simply because the defendant has offered to stipulate to the existence of that conviction. Ibid. As the Ninth Circuit explained, because a stipulation is not evidence, but rather a partial amendment to the defendant's plea, it is not a relevant factor in the balancing process under Rule 403. Id. at

691-692. A contrary result, the court noted, "would defeat the rule against partial guilty pleas in most cases," id. at 692, because in every case in which the defendant offered to stipulate to an element of a charged offense, the prosecution's evidence would have limited probative value beyond that of the stipulation. Ibid.[4]

By contrast, several circuits have held that where the defendant offers to stipulate to his felon status, the probity of evidence regarding the nature of the underlying felony conviction is ordinarily outweighed by the prejudice to the defendant that would be caused by that evidence. See United States v. Jones, 67 F.3d 320 (D.C. Cir. 1995); United States v. Tavares, 21 F.3d 1 (1st Cir. 1995) (en banc) (collecting cases and noting conflict).[5] Those circuits have concluded that the nature of a prior felony is only marginally probative in a Section 922(g) prosecution because the facts underlying the earlier conviction do not constitute an element of the charged offense. Those courts have further reasoned

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[4] The Eighth and Sixth Circuits have reached similar conclusions. See United States v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983); United States v. Blackburn, 592 F.2d 300, 301 (6th Cir. 1979); see also United States v. Williams, 612 F.2d 735, 739-740 (3d Cir. 1979) (prosecution under 18 U.S.C. 922(h)(1)), cert. denied, 445 U.S. 934 (1980).

[5] Petitioner contends (Pet. 13 n.4) that there is a conflict within the Ninth Circuit on the issue presented in this case. In United States v. Barker, 1 F.3d 957 (9th Cir. 1993), modified, 20 F.3d 365 (1994), the Ninth Circuit stated in a footnote that proof of the underlying felony in a Section 922(g) prosecution is irrelevant. Id. at 959 n.3. Even assuming that the dicta in Barker conflicts with the more recent holdings in Breitkreutz and the instant case, any conflict within the Ninth Circuit would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901 (1957).

that the prejudicial potential of prior-felony evidence in such cases is great because the jury may infer that the defendant is guilty of a charged offense that is similar in nature to the prior felony. See United States v. Jones, 67 F.3d at 324; United States v. Tavares, 21 F.3d at 5-6.

Other courts have concluded that the decision to admit or exclude evidence of the specific felony of which the defendant was previously convicted is committed to the discretion of the trial judge and should be made on a case-by-case basis. See United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); United States v. O'Shea, 724 F.2d 1514, 1516-1517 (11th Cir. 1984).

In our view, the rule followed by the Ninth Circuit is correct. As the court explained in Breitkreutz, 8 F.3d at 690-692, a defendant's willingness to stipulate to a past conviction does not diminish the probity of direct evidence of that conviction. The government remains both obligated and entitled to prove every element of its case beyond a reasonable doubt. See, e.g., Estelle v. McGuire, 502 U.S. at 69-70; United States v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983). In the typical prosecution under Section 922(g), documentary evidence in the form of a certified judgment of conviction will ordinarily be the most relevant and probative evidence on that issue. While the government is free to accept a stipulation that would obviate the need for such proof, there is no fixed requirement that it do so rather than introduce relevant evidence on the point. Any potential prejudice can generally be

cured by appropriate limiting instructions. In this case, moreover, the defendant did not seek to have the copy of his prior judgment of conviction that was shown to the jury redacted or otherwise altered to conceal the particular offense of which he was earlier convicted. The introduction of that evidence did not violate Rule 403.

2. In any event, any error in the admission of prior-felony evidence in this case was harmless.[6] See Kotteakos v. United States, 328 U.S. 750, 765 (1940). The district court admonished the jury not to consider petitioner's prior felony conviction as "evidence of guilt of the crime for which the defendant is now on trial." Tr. 317. Petitioner has provided no reason for this Court "to depart from 'the almost invariable assumption of the law that jurors follow their instructions.'" Shannon v. United States, 114 S. Ct. 2419, 2427 (1994) (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)).[7]

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[6] The circuits that have precluded the introduction of evidence regarding the nature of a prior felony in prosecutions under Section 922(g) have applied harmless error analysis to the use of such evidence. See United States v. Jones, 67 F.3d at 325 (applying harmless error analysis, but concluding that the error was not harmless under the facts of the case); United States v. Lewis, 40 F.3d 1325, 1342-1343 (1st Cir. 1994) (holding that error was harmless).

[7] In United States v. Jones, supra, the court of appeals rejected the government's argument that the admission of evidence regarding the nature of the defendant's prior felony was harmless because the district court gave a limiting instruction to the jury. The court stressed that the admission of the defendant's prior drug crime seriously impaired the defendant's ability to present a casual user defense to a charged drug crime and that the government presented no eyewitness testimony inconsistent with the defendant's defense. 67 F.3d at 325. Here, by contrast, the government

(continued...)

This is not a case, moreover, in which the prosecution attempted to explore the details of the prior conviction. Rather, the United States introduced a certified copy of the defendant's judgment and commitment order which identified petitioner's prior felony as an assault. See Gov't C.A. Br. 4. The government's proffer was not inflammatory, nor was it introduced for a purpose other than to establish the existence of an earlier offense punishable by a term of more than one year.

Finally, the evidence against petitioner on each of the charged offenses was compelling. A witness saw petitioner fire the pistol. Gov't C.A. Br. 9. Police officers recovered the pistol from petitioner's truck and seized ammunition and a spent casing for the pistol from petitioner's pocket shortly after his arrest. Ibid. An agent subsequently discovered a bullet hole between the location at which petitioner was standing and the area in which the victim sought refuge. Id. at 8. In light of this evidence, and because the district court provided an adequate limiting instruction, any Rule 403 error was harmless and does not warrant this Court's review.

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[7](...continued)
presented a strong case against petitioner, including eyewitness testimony that he fired the pistol. Gov't C.A. Br. 9. Given the strength of the government's case against petitioner, there is no basis to question the presumption that the jury obeyed the court's limiting instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
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DECEMBER 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

OLD CHIEF, JOHNNY LYNN
Petitioner

vs. No. 95-6556

USA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 29th day of December 1995.

ANTHONY GALLAGHER
SUITE 302, THE LIBERTY CENTER
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Drew S. Days, III/ES

DREW S. DAYS, III
Solicitor General

December 29, 1995

No. _____

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

95-6556

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SECOND MOTION TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, JOHNNY LYNN OLD CHIEF, through counsel, requests that this Honorable Court allow him to proceed *in forma pauperis*. In support of his motion, Petitioner represents as follows:

Trial and Appellate counsel, Daniel Donovan and the Federal Defenders of Montana, Inc., representing Petitioner before this Honorable Court, were appointed pursuant to 18 U.S.C. section 3006A. Therefore, no notarized affidavit or declaration of indigency is required by Supreme Court Rule 39.

DATED this 27th day of October, 1995.

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